Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

TODD C. BANK,

PETITIONER,

v.

COOPER, PAROFF, COOPER & COOK,
IRA G. COOPER, PHILIP S. PAROFF,
ADAM P. COOPER, AND SHARON E. COOK,

RESPONDENTS.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Senior Judges may exercise Article III judicial power even though they: are not required to exercise such power; lack the judicial independence that Article III requires; and are not separately appointed to their positions, which materially differ from the position of an Active Judge.

2. Whether a District Court may treat a letter as though it were a motion under Rule 6(b)(1)(b) of the Federal Rules of Civil Procedure, and, thereafter, preclude the making of an actual motion under that rule.

3. Whether the "clearly erroneous" standard of review of an order of a Magistrate Judge, under which a District Judge may not change or modify, *de novo*, the factual findings of a Magistrate Judge, constitutes a delegation of Article III judicial power to Magistrate Judges.

4. Whether the lack of authority of a District Judge to review an order of a Magistrate Judge to which no party has objected constitutes a delegation of Article III judicial power to Magistrate Judges.

5. Whether the issuance of orders by Magistrate Judges violates the Article III principle of judicial independence and the Constitution's structural principle of separation of powers.

6. Whether the requirement of 15 U.S.C. § 1692e(11) of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"), that a debt collector disclose, in all documents, that it is a debt collector, applies to

each document independently.

7. Whether 15 U.S.C. § 1692f(1) of the FDCPA prohibits only the *actual* collection, as opposed to the *attempted* collection, of an unauthorized debt.

8. Whether the term "any amount" in 15 U.S.C. § 1692f(1) of the FDCPA means "any amount."

9. Whether Rule 43(c) of the Federal Rules of Civil Procedure authorizes a District Court to take oral testimony from a summary-judgment movant in order to enable the movant to negate its failure to comply with the rules that govern the provision of evidence in support of such motion.

10. Whether a plaintiff's belief that a defendant has met a criterion that is part of an affirmative defense removes the burden of proving the affirmative defense from the defendant.

11. Whether a party's lack of success in a state-court proceeding that was commenced after the party's claims arose under 15 U.S.C. §§ 1692e(2)(A), (5) , and (10) of the FDCPA, precludes the party from asserting those claims.

12. Whether, under New York law, a landlord may threaten a tenant to obtain a possessory judgment against the tenant based on the tenant's failure to pay certain ancillary fees even though, under New York Law, the failure to pay those fees would not entitle the landlord to a possessory judgment, thereby rendering the tenant without claims under 15 U.S.C. §§ 1692e(2)(A), (5), and (10) of the FDCPA.

STATEMENT PURSUANT TO RULE 14.1(b)

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this case, and there are no additional parties.

TABLE OF CONTENTS AND TABLE OF AUTHORITIES PURSUANT TO RULE 14.1(c)

Page

TABLE OF AUTHORITIES x

CONSTITUTIONAL PROVISIONS x

STATUTES x

CASES x

OTHER AUTHORITIES xvi

STATEMENT PURSUANT TO RULE 14.1(d) . . xvii

STATEMENT PURSUANT TO RULE 14.1(e) . . xvii

LIST PURSUANT TO RULE 14.1(f) xviii

STATEMENT PURSUANT TO RULE 14.1(g) . . xix

REASONS FOR GRANTING THE PETITION 1

Page

I. THE ISSUE OF WHETHER ARTICLES II AND III OF THE UNITED STATES CONSTITUTION PERMIT SENIOR JUDGESHIPS AT THE DISTRICT-COURT LEVEL CONCERNS CRUCIAL ISSUES OF SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 1

A. The Absence of a Requirement That Senior Judges Perform Any Article III Duties Violates Article III of the Constitution 1

B. The Tenure and Salary Protections of Article III May Not Be Granted to Senior Judges 2

C. The Right To Maintain One's Senior Judgeship By Performing Non-Article III Duties on Behalf of the Executive and Legislative Branches of the Federal Government Violates Separation-of-Powers Principles 2

D. Senior Judgeships Violate the Article III Principle of Judicial Independence 3

(1) Because Senior Judges May Perform Judicial Duties Only By the Permission of Their Colleagues, Senior Judges

Page

Lacks the Independence Required by Article III 3

(ii) That Senior Judges May, by Means Other Than Impeachment, Be Prevented From Exercising Article III Power Violates the Impeachment Clause of the Constitution as Well as the Principle of Judicial Independence 6

E. The Office of a Senior Judge is Separate From the Office of an Active Judge, and Therefore a Senior Judge Must Be Separately Appointed to That Office 6

F. It Is Irrelevant That the President and Senate, When Appointing a Judge, Are Presumably Aware That He Might Become a Senior Judge 12

G. This Court Has Addressed Senior Judgeships Only as a Matter of Statutory Interpretation . . 13

II. A DISTRICT COURT MAY NOT TREAT, AS A MOTION AUTHORIZED BY RULE 6(b)(1)(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE, A LETTER REQUESTING A CONFERENCE 14

Page

III. THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW OF A MAGISTRATE JUDGE'S ORDER CONSTITUTES A DELEGATION OF JUDICIAL POWER IN VIOLATION OF ARTICLE III OF THE CONSTITUTION . . 15

IV. THE LACK OF AUTHORITY OF A DISTRICT JUDGE TO REVIEW THE ORDER OF A MAGISTRATE JUDGE TO WHICH NO PARTY HAS OBJECTED CONSTITUTES A DELEGATION OF ARTICLE III POWER FROM THE DISTRICT JUDGE TO THE MAGISTRATE JUDGE IN VIOLATION OF ARTICLE III OF THE CONSTITUTION 18

(i) Role of a Magistrate Judge to Whom an Assignment is Given 19

(ii) Role of the District Judge After a Magistrate Judge Performs an Assignment 20

V. THE ISSUANCE OF ORDERS BY MAGISTRATE JUDGES VIOLATES THE ARTICLE III PRINCIPLE OF JUDICIAL INDEPENDENCE AND THE CONSTITUTION'S STRUCTURAL PRINCIPLE OF SEPARATION OF POWERS 22

Page

VI. THE SECOND CIRCUIT WRONGLY FOUND THAT THE REQUIREMENT OF 15 U.S.C. § 1692e(11) THAT A DEBT COLLECTOR DISCLOSE, IN ALL DOCUMENTS, THAT IT IS A DEBT COLLECTOR, DOES NOT APPLY TO EACH DOCUMENT INDEPENDENTLY 26

VII. THE SECOND CIRCUIT MIS-INTERPRETED 15 U.S.C. § 1692f(1) AS APPLYING ONLY TO THE ACTUAL, BUT NOT THE ATTEMPTED, COLLECTION OF AN UNAUTHORIZED DEBT 28

VIII. THE SECOND CIRCUIT DISREGARDED THE PLAIN MEANING OF "ANY AMOUNT" IN 15 U.S.C. 1692f(1) 29

IX. RULE 43(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT AUTHORIZE TESTIMONY TO BE USED IN ORDER TO NEGATE A SUMMARY-JUDGMENT MOVANT'S FAILURE TO COMPLY WITH THE EVIDENTIARY RULES RELATING TO SUCH MOTION 30

X. A PLAINTIFF'S BELIEF THAT A DEFENDANT HAS MET A CRITERION THAT IS PART OF AN AFFIRMATIVE DEFENSE DOES NOT REMOVE THE BURDEN OF PROVING

Page

THE AFFIRMATIVE DEFENSE FROM THE DEFENDANT 32

XI. RESPONDENTS' SUCCESS IN THE PARTIES' STATE-COURT PROCEEDING WAS IRRELEVANT TO WHETHER PETITIONER STATED CLAIMS UNDER 15 U.S.C. §§ 1692e(2)(A), (5), AND (10) . . . 33

XII. THE SECOND CIRCUIT MISCONSTRUED NEW YORK LAW IN AFFIRMING THE DISMISSAL OF PETITIONER'S CLAIMS UNDER 15 U.S.C. §§ 1692e(2)(A), (5), AND (10) . . . 34

CONCLUSION 35

Appendix A — Summary Order of the United States Court of Appeals for the Second Circuit, dated and entered December 16, 2009 . . . . . Pet. App. 1a

Appendix B — Order of the United States District Court for the Eastern District of New York, dated May 27, 2009, and entered May 28, 2009 . . . . . Pet. App. 6a

Appendix C — Order of the United States District Court for the Eastern District of New York, dated and entered

Page

January 15, 2009 . . . . . Pet. App. 17a

Appendix D —
Order of the United States
District Court for the Eastern
District of New York, dated
February 4, 2009, and
entered February 5, 2009 . . . . . Pet. App. 18a

Appendix E —
Order of the United States
District Court for the Eastern
District of New York, dated
and entered March 31, 2009 . . . . . Pet. App. 21a

Appendix F —
Order of the United States
Court of Appeals for the
Second Circuit, dated and
entered February 4, 2010 . . . . . Pet. App. 23a

Appendix G — Constitutional and
Statutory Provisions Involved . . . . . Pet. App. 24a

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. II, § 2, cl. 2 . . . . . 6, 9, 10, 11, 12

U.S. Const., Art. II, § 4 6

U.S. Const., Art. III . . . . . *passim*

U.S. Const., Art. III, § 2, cl. 2 . . . . . *passim*

STATUTES

7 U.S.C. § 1, *et seq.* 17, 18, 19

10 U.S.C. § 826 8

11 U.S.C. § 101, *et seq.* 17, 18

15 U.S.C. § 1692e(2)(A) 33, 34, 35

15 U.S.C. § 1692e(5) 33, 34, 35

15 U.S.C. § 1692e(10) 33, 34, 35

15 U.S.C. § 1692e(11) 26, 27

15 U.S.C. § 1692f(1) 28, 29, 30, 31

15 U.S.C. § 1692k(c) 30, 32

28 U.S.C. § 1 1

Page

28 U.S.C. § 2 1

28 U.S.C. § 46(a) 1

28 U.S.C. § 48(a)1

28 U.S.C. § 132(b) 1

28 U.S.C. § 294(b) 1, 7

28 U.S.C. § 294(c) 1, 3, 4, 7

28 U.S.C. § 294(d) 1, 4, 7

28 U.S.C. § 294(e) 4

28 U.S.C. § 332(a)(1) 3

28 U.S.C. § 332(a)(3) 3

28 U.S.C. § 371(b)(1) 2

28 U.S.C. § 371(e)(1) 1

28 U.S.C. § 371(e)(1)(C) 1

28 U.S.C. § 371(e)(1)(D) 1, 2, 3

28 U.S.C. § 631 22

28 U.S.C. § 634 22

28 U.S.C. § 636(b)(1)(A) 15, 18, 19, 20, 21

Page

28 U.S.C. § 636(b)(1)(B) 16, 20

28 U.S.C. § 636(c) 25

28 U.S.C. § 1253 7

Fed. R. Civ. P. 6(b)(1)(B) 14

Fed. R. Civ. P. 43(c) 30

Fed. R. Civ. P. 72 19

Fed. R. Civ. P. 72(a) 15, 18, 19, 21

Fed. R. Civ. P. 72(b)(1) 20

Fed. R. Civ. P. 72(b)(3) 22

CASES

Alexander v. City & County of Honolulu Police Dep't,
2007 U.S. Dist. LEXIS 72939
(D. Hawaii Sept. 12, 2007) 22

Amadeo v. Zant,
486 U.S. 214 (1988) 15

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 15

Booth v. United States,
291 U.S. 339 (1934) 13

Page

Boyar v. Modell,
1986 U.S. Dist. LEXIS 25896
(S.D.N.Y. May 5, 1986) 22

Brusco v. Miller,
639 N.Y.S.2d 246 (N.Y. App. 1995) 34

Buckley v. Valeo,
424 U.S. 1 (1976) 23

Chandler v. Judicial Council of the Tenth Circuit,
398 U.S. 74 (1970) 4, 5, 6

Clemons v. Mississippi,
494 U.S. 738 (1990) 12

Commodity Futures Trading Commission v. Schor,
478 U.S. 833 (1986) 17, 18, 19, 23

Daneshrad v. Cohen & Slamowitz, LLP,
2009 U.S. Dist. LEXIS 18173
(E.D.N.Y. Mar. 9, 2009) 29

Dept. of Housing v. Rucker,
535 U.S. 125 (2002) 21

Drossin v. Nat'l Action Financial Services, Inc.,
641 F. Supp. 2d 1314 (S.D. Fla. 2009) 27

Edmond v. United States,
520 U.S. 651 (1997) 6, 9

Page

Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,
544 U.S. 280 (2005) 33

Geras v. Lafayette Display Fixtures, Inc.,
742 F.2d 1037 (7th Cir. 1984) 25, 26

Green v. Hocking,
9 F.3d 18 (6th Cir. 1993),
abrogated on other grounds,
Heintz v. Jenkins, 514 U.S. 291 (1995) 28-29

Hoblock v. Albany County Bd. of Elections,
422 F.3d 77 (2d Cir. 2005) 33

Johnson v. Riddle,
305 F.3d 1107 (10th Cir. 2002) 28

Miller v. Wolpoff & Abramson, L.L.P.,
321 F.3d 292 (2d Cir. 2003) 28

National Insurance Co. v. Tidewater Co.,
337 U.S. 582 (1949) 23

Northern Pipeline Constr. Co. v.
Marathon Pipe Line Co.,
458 U.S. 50 (1982) 3, 17, 18

Pipiles v. Credit Bureau of Lockport, Inc.,
886 F.2d 22 (2d Cir. 1989) 27

Related Tiffany, L.P. v. Faust,
743 N.Y.S.2d 802 (N.Y. App. 2002) 34

Page

Russell v. Equifax A.R.S.,
74 F.3d 30 (2d Cir. 1996) 27

Salve Regina College v. Russell,
499 U.S. 225 (1991) 12

Savage v. NIC, Inc.,
2009 U.S. Dist. LEXIS 65071
(D. Ariz. July 28, 2009) 27

Schwarm v. Craighead,
552 F. Supp. 2d 1056 (E.D. Cal. 2008) 27

Shoemaker v. United States,
147 U.S. 282 (1893) 10

Shurtleff v. United States,
189 U.S. 311 (1903) 6

Silber v. Schwartzman,
575 N.Y.S.2d 226 (N.Y. App. 1991) 34

Thomas v. Arn,
474 U.S. 140 (1985) 16

United States v. Dees,
125 F.3d 261 (5th Cir. 1997) 23, 24

United States v. Raddatz,
447 U.S. 667 (1980) 16, 17

United States v. Will,
449 U.S. 200 (1980) 23

Page

Velez v. SES Operating Corp.,
2008 U.S. Dist. LEXIS 51257
(S.D.N.Y. July 3, 2008) 14

Vital v. Interfaith Medical Center,
168 F.3d 615 (2d Cir. 1999) 31

Weiss v. United States,
510 U.S. 163 (1994) 7, 8, 9, 10, 11, 12, 13

OTHER AUTHORITIES

4 *The Founders' Constitution*
(Philip B. Kurland &
Ralph Lerner, eds., 1987) 2

History of Appointments to the Supreme Court,
4B Op. Off. Legal Counsel 457 (1980) 8

Legislation Authorizing the Transfer of Federal Judges from One District to Another,
4B Op. Off. Legal Counsel 538 (1980) 8

Stras & Scott, *Are Senior Judges Unconstitutional?*
92 Cornell L. Rev. 453 (2007) 13, n.1

Stras & Scott, *Retaining Life Tenure: The Case for a "Golden Parachute,"*
83 Wash. U. L.Q. 1397 (2005) 1-2

STATEMENT PURSUANT TO RULE 14.1(d)

The Summary Order of the United States Court of Appeals for the Second Circuit (Katzmann, *J.*; Lynch, *J.* McLaughlin, *S.J.*, recused) is not officially reported, but is available at 2009 U.S. App. LEXIS 27555 (2d Cir. Dec. 16, 2009), and is reprinted in Petitioner's Appendix (Pet. App.) at 1a-5a. The Order of the District Court (Weinstein, *S.J.*) is unreported but is available at 2009 U.S. Dist. LEXIS 47544 (E.D.N.Y. May 27, 2009), and is reprinted at Pet. App. at 6a-16a.

The Order of the United States District Court for the Eastern District of New York, dated and entered January 15, 2009, is not reported, but is reprinted at Pet. App. 17a. The Order of the United States District Court for the Eastern District of New York, dated February 4, 2009, and entered February 5, 2009, is not reported, but is reprinted at Pet. App. at 18a-20a. The Order of the United States District Court for the Eastern District of New York, dated and entered March 31, 2009, is not reported, but is reprinted at Pet. App. at 21a-22a. The Order of the United States Court of Appeals for the Second Circuit, dated and entered February 4, 2010, is not reported, but is reprinted at Pet. App. at 23a.

STATEMENT PURSUANT TO RULE 14.1(e)

On December 16, 2009, the Second Circuit entered the order that Petitioner seeks to appeal. *See* Pet. App. at 1a-5a. On February 4, 2010, that court denied Petitioner's petition for rehearing. *See* Pet. App. at 23a This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Title 28 U. S. C. § 2403(a) might be applicable if this Petition is granted. The Second Circuit did not certify to the Attorney General, pursuant to 28 U. S. C. § 2403(a), the fact that the Constitutionality of an Act of Congress was drawn into question.

LIST PURSUANT TO RULE 14.1(f)

A. **Constitutional Provisions** . . . . . Pet. App. 24a

U.S. Const., Art. II, § 2, cl. 2 . . . . . Pet. App. 24a

U.S. Const., Art. II, § 4 . . . . . Pet. App. 24a

U.S. Const., Art. III, Section 1 . . . . . Pet. App. 24a

B. **Statutory Provisions** . . . . . Pet. App. 25a

15 U.S.C. § 1692e . . . . . Pet. App. 25a

15 U.S.C. § 1692f . . . . . Pet. App. 26a

28 U.S.C. § 294 . . . . . Pet. App. 26a

28 U.S.C. § 371 . . . . . Pet. App. 28a

28 U.S.C. § 636(b) . . . . . Pet. App. 32a

Fed. R. Civ. P. 6(b) . . . . . Pet. App.33a

Fed. R. Civ. P. 43(c) . . . . . Pet. App. 34a

Fed. R. Civ. P. 72 . . . . . Pet. App. 34a

STATEMENT PURSUANT TO RULE 14.1(g)

The District Court action, which arose under the under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"), was commenced on September 24, 2008. The District Court had jurisdiction under 28 U.S.C. § 1331.

Petitioner's claims were based a rent-demand notice ("Rent Notice") that Respondents served upon Petitioner as a legally required predicate to a landlord-tenant action in New York state court.

On January 7, 2009, Respondents served a motion for summary judgment. On January 8, 2009, Petitioner served a motion to dismiss Respondents' counterclaim ("Counterclaim-Dismissal Motion") one day later than required by a scheduling order of Magistrate Judge Lois Bloom. Respondents then notified Magistrate Judge Bloom by letter that they had rejected the motion as untimely. Thereafter, Petitioner, in a letter to Magistrate Judge Bloom, "request[ed] a conference with the Court in an attempt to resolve this matter without having to engage in what would, I believe, be wasteful motion practice for all concerned." On January 15, 2009, Magistrate Judge Bloom issued an order that treated that letter as a motion, and denied that "motion." *See* Pet. App. at 17a.

Next, Petitioner served a motion, pursuant to Rule 6(b)(1)(B) of the Federal Rules of Civil Procedure ("Rule 6(b)(1)(B) Motion"), for an order extending the time to serve the Counterclaim-Dismissal Motion.

In an order dated February 4, 2009, Magistrate Judge Bloom, to whom Petitioner's Rule 6(b)(1)(B)

Motion had been assigned by District Judge Jack B. Weinstein, stated as follows: "[a]s the Court previously endorsed plaintiff's letter, stating that [Respondents] were within their rights to reject the later service of [Petitioner]'s motion as [Petitioner] could have requested an extension of time to serve his motion, . . . the Court construes [Petitioner]'s instant request as seeking *reconsideration*." (italicized emphasis added). Magistrate Judge Bloom proceeded to deny Petitioner's motion on the grounds that "[Petitioner] fail[ed] to satisfy the Court that he is entitled to *reconsideration*." Pet. App. at 19a (emphasis added).

On February 19, 2009, Petitioner served a motion (1) seeking to *vacate* both Orders of Magistrate Judge Bloom, and (2) *objecting* to the February 4, 2009, Order, but not to the January 15, 2009 ("February 19, 2009, Motion"). As part of that motion, Petitioner requested that the motion itself be reassigned to an Active District Judge based on Petitioner's position that Senior Judgeships are un-Constitutional.

As part of the February 19, 2009, Motion, Petitioner also explained that his Rule 6(b)(1)(B) Motion should be governed by the "good cause" standard of that rule.

As part of the February 19, 2009, Motion, Petitioner also argued that the issuance of the orders of Magistrate Judge Bloom constituted delegations of judicial power to Magistrate Judge Bloom in violation of Article III of the Constitution.

On February 24, 2009, Judge Weinstein ordered that the February 19, 2009, Motion "challenging the Court's organization is respectfully referred to the

Chief Judge Raymond J. Dearie."

Judge Dearie, in an order dated March 31, 2009, denied Petitioner's motion with respect to Petitioner's arguments concerning Senior and Magistrate Judgeships. *See* Pet. App. at 21a-22a.

Judge Weinstein, in an order dated May 27, 2009, upheld the Order of Magistrate Judge Bloom dated February 4, 2009, and granted summary judgment to Respondents on all of Petitioner's claims. *See* Pet. App. at 6a-16a.

On December 16, 2009, the Second Circuit affirmed the ruling of the District Court, *see* Pet. App. at 1a-5a; and, on February 4, 2010, the Second Circuit denied Petitioner's petition for rehearing. *See* Pet. App. at 23a.

REASONS FOR GRANTING THE PETITION

POINT I

THE ISSUE OF WHETHER ARTICLES II AND III OF THE UNITED STATES CONSTITUTION PERMIT SENIOR JUDGESHIPS AT THE DISTRICT-COURT LEVEL CONCERNS CRUCIAL ISSUES OF SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE

A. The Absence of a Requirement That Senior Judges Perform Any Article III Duties Violates Article III of the Constitution

Whereas Active Article III Judges are obligated to regularly perform Article III duties, *see* 28 U.S.C. §§ 1, 2, 46(a), 48(a), 132(b), 139, Senior Judges are *not* required to perform *any* Article III duties. *See* 28 U.S.C. § 371(e)(1)(C) and (D). Rather, only a Senior Judge who is "willing" to perform Article III duties, *see* 28 U.S.C. § 294(b) - (d), the quantity of which such Senior Judge is free to choose, *see* 28 U.S.C. § 371(e)(1), shall undertake such duties, but only to the extent, if any, that such duties are "designated and assigned" to him. 28 U.S.C. § 294(c), (d). However, Article III does not permit the creation of an Article III office that does not require the performance of any Article III duties. *See* Stras & Scott, *Retaining Life Tenure: The Case for a "Golden Parachute,"* 83 Wash. U. L.Q. 1397, 1414-1415 (2005).

B. The Tenure and Salary Protections of Article III May Not Be Granted to Senior Judges

Because a Senior Judge is permitted to act as an Article III Judge in name while not in actuality, it is a violation of Article III to give him, as is now the case, Article III's tenure and salary protections. *See* 28 U.S.C. § 371(b)(1). As a Senior Judge is not a genuine Article III Judge but is instead a non-Article III officer, he must be removable, at will, by the President; if a Senior Judge may not be so removed, then the President's removal power could likewise be stripped with respect to any other non-Article III officers. *See* Letter from James Madison to Thomas Jefferson (June 30, 1789), reprinted in 4 *The Founders' Constitution*, at 104 (Philip B. Kurland & Ralph Lerner, eds., 1987).

C. The Right To Maintain One's Senior Judgeship By Performing Non-Article III Duties on Behalf of the Executive and Legislative Branches of the Federal Government Violates Separation-of-Powers Principles

Notwithstanding that a Senior Judge is not a genuine Article III officer, *see* Point I.B, *supra*, a Senior Judge may "retain [his Article III] office" by "perform[ing] substantial duties for a Federal or State *governmental entity*." 28 U.S.C. § 371(e)(1)(D) (emphases added). The maintenance of one's Article III Judgeship by acting as an agent of the federal Executive or Legislative Branch plainly violates the most fundamental separation-of-powers principles, under which each of the three branches of the federal government is exclusively vested with the powers of

the respective branch. Just as one could not hold an Article II office by acting as an Article I or Article III officer, one may not hold an Article III office by acting as an Article I or Article II officer. However, that is precisely what Section 371(e)(1)(D) purports to allow.

D. Senior Judgeships Violate the Article III Principle of Judicial Independence

(i) Because Senior Judges May Perform Judicial Duties Only By the Permission of Their Colleagues, Senior Judges Lacks the Independence Required by Article III

Notwithstanding this Court's recognition that "[t]he guarantee of life tenure insulates the individual judge from improper influences not only by other branches but *by colleagues* as well, and thus promotes *judicial individualism*," *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60, n.10 (1982) (emphases added), a Senior Judge, in order to perform judicial duties on a District Court or Circuit Court *within* his home circuit, must be "designated and assigned" to do so by either the Chief Circuit Judge or judicial council of that circuit, *see* 28 U.S.C. § 294(c), while the judicial council of a circuit, in turn, is composed of the Chief Circuit Judge and an equal number of Circuit and District Judges, *see* 28 U.S.C. § 332(a)(1), who themselves can be Active or Senior Judges. *See* 28 U.S.C. § 332(a)(3). In order to perform judicial duties on a District Court or Circuit Court *outside* his home circuit, a Senior Judge must be "designated and assigned" to do so by the Chief Justice "upon the presentation [to the Chief Justice] of a certificate of necessity by the chief judge or circuit

justice of the [outside] circuit." 28 U.S.C. § 294(d). In sum, "[n]o [Senior] [J]udge shall perform judicial duties except when designated and assigned." 28 U.S.C. § 294(e).

Section 371 imposes no restrictions on the criteria that a Chief Circuit Judge or Judicial Council may employ in choosing which Senior Judges, if any, to assign to which cases. *See* 28 U.S.C. § 294(c), (d). Thus, Section 371 authorizes the Chief Circuit Judge and Judicial Council to refuse to appoint a Senior Judge to perform *any* Article III duties. Because Section 371 places no limits on the discretion of a Chief Circuit Judge or Judicial Council, assignments may be based upon any criteria, whether subjective or objective. Therefore, at least with respect to Senior Judges who desire to perform Article III duties, this *carte blanche* necessarily puts, at risk, the independence of Senior Judges, whose future assignments, in terms of whether, when, how often, and to which cases they are to be assigned, may clearly be affected by their rulings or votes, or even by facets of their non-judicial life, such as their political views or their sociability with the Chief Circuit Judge or the members of the Judicial Council. As explained by Justice Douglas in his dissenting opinion in *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970):

> An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, *he is independent of every other judge*. He commonly works with other federal judges who are likewise sovereign. *But neither one alone nor any number banded*

> *together can act as censor and place sanctions on him.* Under the Constitution the only leverage that can be asserted against him is impeachment . . . .

Id. at 136 (Douglas, J., dissenting) (emphases added). *See also Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984) (Posner, J., dissenting):

> It is not only the citizenry that has an interest in the quality of federal justice. . . . The states have not consented to have issues of their own law determined by judges who do not have the guarantees of independence that Article III requires for federal judges. And they have not consented to have federal law interpreted and applied against them by judges who are not independent, but are the handmaidens of Congress or the President *(or, for that matter, of other judges)*.

Id. at 1052 (Posner, J., dissenting) (emphasis added).

(ii) That Senior Judges May, by Means Other Than Impeachment, Be Prevented From Exercising Article III Power Violates the Impeachment Clause of the Constitution as Well as the Principle of Judicial Independence

The authority of the Chief Circuit Judge or Judicial Council to prevent a Senior Judge from exercising Article III power violates not only the Article III principle of judicial independence, *see* Point I.D(i), *supra*, but also the Impeachment Clause of the Constitution, which provides that "all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors," Art. II, § 4, and which has been interpreted to mean that "the only leverage that can be asserted against [an Article III Judge] is impeachment." *Chandler*, *supra*, 398 U.S. at 136 (Douglas, J., dissenting) (as noted in *Shurtleff v. United States*, 189 U.S. 311, 316 (1903), federal judges are "civil officers" within the meaning of this clause).

E. The Office of a Senior Judge is Separate From the Office of an Active Judge, and Therefore a Senior Judge Must Be Separately Appointed to That Office

Under the Appointments Clause of the Constitution (Art. II, § 2, cl. 2), "principal . . . officers within the meaning of the [] Clause . . . must [] be appointed by the President with the advice and consent of the Senate." *Edmond v. United States*, 520 U.S. 651, 655-656 (1997). Because a Senior Judge retains the

right to perform Article III duties, he is a principal officer. *See Weiss v. United States*, 510 U.S. 163, 191, 192, n.7 (1994) (Souter, J., concurring) (explaining that federal judges are principal officers). However, the differences between an Active Article III Judgeship and a Senior Judgeship render them separate offices that therefore require separate appointments (assuming, *arguendo*, that Senior Judgeships were otherwise Constitutional). First, unlike an active Article III Judge, a Senior Judge is not required to perform any Article III duties, but, rather, only those that he is "willing" to perform, *see* 28 U.S.C. § 294(b) - (d); second, even upon being so willing, he will then perform only those Article III duties to which he is "designated and assigned," *see id.*; third, a Senior Judge may act as an "itinerant" judge in that he may be "designated and assigned" to serve on any District Court within his Circuit, *see* 28 U.S.C. § 294(c), and on his Circuit's Court of Appeals, *see id.*, and on the District Courts and Courts of Appeals of any other Circuit. *See* 28 U.S.C. § 294(d).

Even a Senior Judge who serves only on the Court to which he had been appointed as an *Active* Judge would have been appointed to serve *in that capacity* as an *independent judge* who was *obligated* to perform judicial duties, rather than to perform such duties only with the permission of his judicial peers, and only if he wishes to do, or to serve, as a Senior Judge may, in a non-judicial (*e.g.*, administrative) capacity, or even in no capacity at all while preserving the right to seek to resume Article III duties.

An itinerant Senior Judge would likewise have originally been appointed to serve on a particular court, not to serve as a free-floating judge on courts of

different levels and in different circuits (again, when he is so willing and is chosen to do so by his peers). *See Legislation Authorizing the Transfer of Federal Judges from One District to Another*, 4B Op. Off. Legal Counsel 538, 540 (1980) ("a judge's commission includes the name of the district or circuit in which he is intended to serve, and his appointment and confirmation are predicated on the expectation that he will in fact be serving in that district or circuit."); *see also id.* at 541 (acknowledging that the Constitutionality of itinerant Senior Judges is not clear). In making an Article III appointment to a particular court, the President and Senate unquestionably take into account any of a variety of factors. *See History of Appointments to the Supreme Court*, 4B Op. Off. Legal Counsel 457, 461-67 (1980) (highlighting the importance of geography, political and legal philosophy, and other factors in the selection of Supreme Court Justices). Thus, by serving in a different geographic region and/or at a higher or lower level of the judicial hierarchy than that to which a Senior Judge had originally been appointed, the itinerant Senior Judge can upset every aspect of the original appointment calculus. *See Legislation Authorizing the Transfer of Federal Judges from One District to Another*, 4B Op. Off. Legal Counsel 538, 541 (1980) (stating that a transfer option for federal judges would "go against a tradition of regionalism in the selection of district judges that, if not constitutionally required, has about it an aura of constitutional respectability that should be disturbed only for compelling reasons").

In *Weiss v. United States*, 510 U.S. 163 (1994), this Court addressed 10 U.S.C. § 826, under which the Judge Advocate General of each respective branch of

the Armed Forces was authorized to assign commissioned officers to serve as military trial judges. Commissioned officers were inferior officers who were appointed by the President and Senate, *see id.* at 168, 168, n.2, *i.e.*, in the manner by which principal officers *must* be appointed but that is also "the *default manner* of appointment for *inferior* officers." *Edmond v. United States*, 520 U.S. 651, 660 (1997) (emphases added). Like commissioned officers, military trial judges were also considered to be inferior officers. *See Weiss*, 510 U.S. at 182 (Souter, J., concurring). However, Judge Advocates General did not have the authority under the Appointments Clause to appoint inferior officers. *See Weiss*, 510 U.S. at 196 (Scalia, J., concurring). Thus, in order to decide whether Judges Advocate General could be given the authority to assign commissioned officers to serve as military trial judges, the Court set out to determine whether the position of a military trial judge "is so different from other positions to which a[] [commissioned] officer may be assigned that . . . the Appointments Clause, by constitutional command, requires [a separate appointment]." *Weiss*, 510 U.S. at 170.

The Court upheld the statute because it found that the large number of individuals who were eligible to be military judges meant that "there is no ground for suspicion here that Congress was trying to both create an office and also select a particular individual to fill the office." *Weiss*, 510 U.S. at 174. The Court also explained that, "[e]ven if we assume, *arguendo*, that the principle of 'germaneness' applies to the present situation, we think that principle is satisfied here." *Weiss*, 510 U.S. at 174. Justice Scalia's concurring opinion makes clear that the germaneness requirement is not limited to those situations in which Congress

seeks effective control over which specific individuals will assume new duties:

> The Court states that these cases differ from *Shoemaker v. United States*, 147 U.S. 282 (1893), because, after the passage of the Military Justice Act of 1968, military judges could be selected from "hundreds or perhaps thousands of qualified commissioned officers," *ante*, at 759, so that there is no concern (as there was in *Shoemaker*, where a single incumbent held the office whose duties were enlarged) that "Congress was trying to both create an office and also select a particular individual to fill the office," *ante*, at 174. That certainly distinguishes *Shoemaker*, but I do not see why it leads to the Court's conclusion that therefore "germaneness" analysis need not be conducted here as it was in *Shoemaker* (though the Court proceeds to conduct it anyway, *ante*, at 174-176).
>
> Germaneness analysis must be conducted, it seems to me, whenever that is necessary to assure that the conferring of new duties does not violate the Appointments Clause. Violation of the Appointments Clause occurs not only when (as in *Shoemaker*) Congress may be aggrandizing itself (by effectively appropriating the appointment power over the officer exercising the new duties), but also when Congress, without aggrandizing itself, *effectively lodges*

> *appointment power in any person other than those whom the Constitution specifies.* Thus, "germaneness" is relevant whenever Congress gives power to confer new duties to anyone other than the few potential recipients of the appointment power specified in the Appointments Clause--*i.e.*, the President, the Courts of Law, and Heads of Departments.

Weiss, 510 U.S. at 195-196 (Scalia, J., concurring) (emphasis added).

Absent the germaneness requirement, one who has been appointed to an office could thereafter be appointed, outside the strictures of the Appointments Clause, to a second office so long as there are a sufficient number of officers of the first type such that Congress could not be said to have attempted to have the second office occupied by any particular individuals. Thus, Congress would, for example, be able to authorize any third party (or even an officer himself, as is the case with respect to Active Judges who choose to become Senior Judges) to appoint, from a sufficiently large pool of individuals, an officer whose appointment would otherwise have to be made in accordance with the Appointments Clause. However, doing so would violate the Appointments Clause's anti-abdication principle:

> [N]o branch may abdicate its Appointments Clause duties. Congress, for example, may not authorize the appointment of a principal officer without Senate confirmation . . . . [FN3]

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> [FN3] the ready analogy to the Appointments Clause's anti-abdication principle is what has been called "nondelegation doctrine."

Weiss, 510 U.S. at 188, 189 (Souter, J., concurring).

Finally, inasmuch as a Senior Judge may fulfill his duties by serving on a level of the federal judiciary that differs from the level on which he was appointed to serve, such option further violates the Appointments Clause, for the offices of District Judge and Circuit Judge are markedly distinct, such that one who is appointed to one office may not occupy the other office without being separately appointed to it. *See Clemons v. Mississippi*, 494 U.S. 738, 768 (1990) ("this Court [] has emphasized that trial and appellate tribunals respectively perform distinct functions"); *Salve Regina College v. Russell*, 499 U.S. 225, 231-232 (1991) ("District Judges preside over fast-paced trials [and make factual findings based on evidence][,] [while] Courts of appeals, on the other hand, are structurally suited to the collaborative judicial process that promotes decisional accuracy . . . [and] devote their primary attention to legal issues.").

F. It Is Irrelevant That the President and Senate, When Appointing a Judge, Are Presumably Aware That He Might Become a Senior Judge

Presumably, the President and Senate, when appointing an Article III Judge, are aware that such a

Judge might become a Senior Judge. However, that is irrelevant. See *Weiss*, 510 U.S. at 187 (Souter, J., concurring).

G. This Court Has Addressed Senior Judgeships Only as a Matter of Statutory Interpretation

In *Booth v. United States*, 291 U.S. 339 (1934), this Court addressed two questions: "1. Does a [Senior Judge] continue in office within the meaning of section 1 of article III of the Constitution . . . ?," *id.* at 346; and "2. Where the salary of a United States District or Circuit Judge is increased by law after his appointment and he has subsequently retired in full compliance with the provisions of section 260 of the Judicial Code, as amended; is a reduction of [a senior judge's] compensation . . . to an amount [equal or greater to that which] his salary [had been] at the time of his [original] appointment [as an active judge] a diminution of his compensation within the meaning of section 1 of article III of the Constitution?" *Id.* The Court answered both questions in the affirmative. The Court's statement that "[i]t is too late to contend that services so performed were extra-legal and unconstitutional," *id.* at 351; was made only in the context of answering the first question, which, again, was a statutory question, not a Constitutional one; indeed, the opinion contained no discussion of the Constitutional issue.[1]

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[1] There is also academic opinion that Senior Judgeships are un-Constitutional. *See, e.g.*, Stras & Scott, *Are Senior Judges Unconstitutional?*, 92 Cornell L. Rev. 453 (2007).

POINT II

A DISTRICT COURT MAY NOT TREAT, AS A MOTION AUTHORIZED BY RULE 6(b)(1)(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE, A LETTER REQUESTING A CONFERENCE

Petitioner's Rule 6(b)(1)(B) Motion was made as of right. *See Velez v. SES Operating Corp.*, 2008 U.S. Dist. LEXIS 51257 at *2 (S.D.N.Y. July 3, 2008). However, Magistrate Judge Bloom, in the February 4, 2009, Order (*see* Pet. App. at 18a-20a), treated that motion as a motion for *reconsideration* of the January 15, 2009, Order, thereby denying Petitioner his right to make a Rule 6(b)(1)(B) motion, for the right to make a particular motion necessarily includes the right to have the motion resolved in accordance with the criteria that govern that motion; here, good cause and a showing of excusable neglect. *See* Fed. R. Civ. P. 6(b)(1)(B).

Finally, the February 4, 2009, Order, even if it had applied the proper standards to Petitioner's Rule 6(b)(1)(B) Motion, would have remained improper, as it would have been issued in response to a *letter*, not a *motion*.

POINT III

THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW OF A MAGISTRATE JUDGE'S ORDER CONSTITUTES A DELEGATION OF JUDICIAL POWER IN VIOLATION OF ARTICLE III OF THE CONSTITUTION[2]

A District Judge may modify or reverse an order of a Magistrate Judge only to the extent that the order is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); *accord*, Fed. R. Civ. P. 72(a) ("clearly erroneous or is contrary to law").

In *Amadeo v. Zant*, 486 U.S. 214 (1988), this Court noted that "the clearly-erroneous standard of review is a deferential one." *Id.* at 223. That is, a District Judge may change or modify the factual findings of a Magistrate Judge's order only if the District Judge, "on the entire evidence[,] is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (internal citation and quotation marks omitted). Thus, neither a District Judge's mere disagreement with the factual findings of a Magistrate Judge's order, nor the fact that the District Judge would have made different factual findings if he, rather than the Magistrate Judge, had issued the order in question, are sufficient grounds to

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[2] Judge Dearie, in his order dated March 31, 2009, incorrectly stated that Plaintiff, with respect to the Constitutionality of Magistrate Judgeships, limited his arguments to cases that, like the present one was, are assigned to a Senior Judge. *See* Pet. App. at 22a.

change or modify those factual findings. Therefore, unlike in the case of a Report and Recommendation, in which the District Judge has the authority to apply *de novo* review to factual as well as legal findings, *see Thomas v. Arn*, 474 U.S. 140, 154 (1985), the "clearly erroneous" standard of review, as further set forth below, constitutes a delegation of a portion of the Judicial Power from Article III judges, *i.e.*, District Judges, to non-Article III entities, *i.e.*, Magistrate Judges, who may not exercise *any* Article III judicial power.

In *United States v. Raddatz*, 447 U.S. 667 (1980), this Court upheld Section 636(b)(1)(B) of the FMA because that provision "provided that the magistrate's *proposed findings and recommendations* shall be subjected to a *de novo* determination by the [district] judge[,] who . . . then [exercises] the ultimate authority to issue an appropriate order. Moreover, [the] authority -- and the responsibility -- to make an informed, final determination . . . remains with the [district] judge." *Id.* at 681-682 (emphasis added) (citations and quotation marks omitted) (bracketed "district" added; other brackets in original). Accordingly, this Court found that a District Judge's authority to conduct *de novo* review satisfies the requirements of Article III that "the magistrate act[] subsidiar[il]y to and only in aid of the district court," *Raddatz*, 447 U.S. at 681, and that "the entire process takes place under the district court's total control and jurisdiction." *Id.* By *contrast*, the factual findings of a Magistrate Judge's *order* are *not* subject to *de novo* review, meaning that the District Judge, rather than retaining the "ultimate authority to issue an appropriate order [and the] authority -- and the responsibility -- to make an informed, final

determination," *Raddatz*, 447 U.S. at 682, delegates a portion of that authority and responsibility to the Magistrate Judge.

In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court held that the Bankruptcy Act of 1978, 11 U.S.C. § 101, *et seq.*, violated Article III. Much of the reasoning of the *Northern Pipeline* plurality is applicable to the issuance of orders by Magistrate Judges. Specifically, the plurality cited the fact that the authority of Bankruptcy Judges, who, like Magistrate Judges, are non-Article III adjuncts, *see Northern Pipeline*, 458 U.S. at 53, was not "narrowly confined [to] factual determinations regarding a particularized area of law." *Id.* at 85. The same is true of the authority, under the FMA, of Magistrate Judges. By contrast, this Court, in *Commodity Futures Trading Commission* [*(CFTC)*] *v. Schor*, 478 U.S. 833 (1986), upheld the Commodity Exchange Act, 7 U.S.C. § 1, *et seq.*, against an Article III challenge because, *inter alia*, "[t]he CFTC . . . deals only with a 'particularized area of law.'" *Id.* at 852, quoting *Northern Pipeline*, 458 U.S. at 85.

In *Northern Pipeline*, the plurality opinion was also based in part on the fact that "the judgments of the bankruptcy courts are . . . subject to review only under the more deferential 'clearly erroneous' standard," *Northern Pipeline*, 458 U.S. at 85, as compared to a "'not supported by the evidence'" standard. *Id.* Again, the same is true with respect to factual findings in the order of a Magistrate Judge. By contrast, another factor in the *Schor* Court's upholding of the Commodity Exchange Act was that "CFTC orders are also reviewed under the . . . 'weight of the evidence' standard . . ., rather than the more

deferential standard [at issue] in *Northern Pipeline*." *Schor*, 478 U.S. at 853, citing *Northern Pipeline*, 458 U.S. at 85. As the *Northern Pipeline* plurality opinion also noted, "[the] precedents [of the Supreme Court] make it clear that the constitutional requirements for the exercise of the judicial power must be met at *all stages of adjudication*, and not only on appeal." *Northern Pipeline*, 458 U.S. at 86, n.39 (emphasis added).

In sum, Section 636(b)(1)(A) of the FMA and Fed. R. Civ. P. 72(a), by requiring the use of the "clearly erroneous" standard of review, authorize Magistrate Judges to exercise Judicial Power in violation of Article III.

POINT IV

THE LACK OF AUTHORITY OF A DISTRICT JUDGE TO REVIEW THE ORDER OF A MAGISTRATE JUDGE TO WHICH NO PARTY HAS OBJECTED CONSTITUTES A DELEGATION OF ARTICLE III POWER FROM THE DISTRICT JUDGE TO THE MAGISTRATE JUDGE IN VIOLATION OF ARTICLE III OF THE CONSTITUTION

As noted in Point III, *supra*, this Court, in *Schor*, *supra*, upheld the Constitutionality of the Commodity Exchange Act, 7 U.S.C. § 1, *et seq*. The Court upheld that act because, *inter alia*, "CFTC orders, . . . unlike those of the bankruptcy courts under the [Bankruptcy Act of 1978], are enforceable only by order of the district court." *Schor*, 478 U.S. at 853, citing *Northern Pipeline*, *supra*, 458 U.S. at 85-86. By contrast, as

argued in subpoint (ii), *infra*, a District Judge has the authority to review only those *portions* of the order of a Magistrate Judge to which objections are made.

The *Schor* Court also found that the Commodity Exchange Act satisfied the Article III principle that "[t]he legal rulings of [non-Article III adjuncts to District Judges must be] subject to *de novo* review." *Schor*, *supra*, 478 U.S. at 853. As explained in subpoint (ii), *infra*, by contrast, a District Judge does not have the authority to review, under the *de novo* or any other standard, the legal rulings of a Magistrate Judge's order to which no objections are made.

Finally, a comparison of how the statutory scheme, *i.e.*, the FMA and Fed. R. Civ. P. 72, addresses *non-dispositive* pre-trial matters (in connection with which Magistrate Judges issue an order) versus *dispositive* pre-trial motions (in connection with which a Magistrate Judges issues a Report and Recommendation) makes clear that review by a District Judge of the non-objected portions of a Magistrate Judge's order, whether such portions constitute part or all of the order, is not permitted.

(i) Role of a Magistrate Judge to Whom an Assignment is Given

With respect to *non-dispositive* pre-trial matters, *i.e.*, orders, Section 636(b)(1)(A) of the FMA provides, in part, that "a [district] judge may designate a magistrate judge to hear and *determine* [non-dispositive pre-trial matters] . . . ." (emphasis added). Fed. R. Civ. P. 72(a), which is substantively identical to Section 636(b)(1)(A), provides, in part, that "[w]hen a pretrial matter *not dispositive* of a party's claim or

defense is referred to a magistrate judge to hear and *decide*, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written *order* stating the *decision*" (emphases added).

With respect to *dispositive* pre-trial motions, *i.e.*, Reports and Recommendations, Section 636(b)(1)(B), provides, in part, that "a [district] judge may [] designate a magistrate judge to . . . submit to [the district] judge [] *proposed* findings of fact and *recommendations* for the *disposition*[] *by a* [*district*] *judge*" (emphases added). Fed. R. Civ. P. 72(b)(1) is, in relevant part, substantively identical to Section 636(b)(1)(B) of the FMA: "[a] magistrate judge must promptly conduct . . . proceedings when assigned . . . to hear a pretrial matter *dispositive* of a claim or defense. . . . The magistrate judge must enter a *recommended disposition*, including, if appropriate, *proposed* findings of fact" (emphases added). It is thus clear that a Magistrate Judge who is assigned a *non-dispositive* matter is to issue an *order*, as occurred in the present case, while a Magistrate Judge who is assigned a *dispositive* motion is to issue a *recommendation* to the District Judge, who, in turn, has the sole authority to issue an order.

(ii) Role of the District Judge After a Magistrate Judge Performs an Assignment

With respect to *non-dispositive* pre-trial matters, *i.e.*, orders, Section 636(b)(1)(A) of the FMA provides, in relevant part, that "[a] district judge [] may reconsider any [non-dispositive] pretrial matter . . . *where it has been shown* that the magistrate judge's order is clearly erroneous or contrary to law" (emphasis

added). Fed. R. Civ. P. 72(a) is, in relevant part, similar to Section 636(b)(1)(A): "[t]he district judge . . . *must consider timely objections* and modify or set aside *any part* of the order that is clearly erroneous or is contrary to law" (emphases added).

The only difference between Section 636(b)(1)(A) and Fed. R. Civ. P. 72(a) is that Rule 72(a) makes clear that the authority of a District Judge to review an order of a Magistrate Judge is limited to *only those portions* of the order to which objections are made, whereas Section 636(b)(1)(A) is unclear as to whether it is in accord with Fed. R. Civ. P. 72(a) regarding the scope of review, or whether, in contrast to Fed. R. Civ. P. 72(a), it authorizes a District Judge to review the *entire* order of a Magistrate Judge if any objections are made to the order. However, given that Fed. R. Civ. P. 72(a) is explicit on this issue whereas Section 636(b)(1)(A) of the FMA is unclear, the explicitness of Rule 72(a) should prevail. *See Dept. of Housing v. Rucker*, 535 U.S. 125, 132 (2002). Moreover, it would be quite singular to authorize a District Judge to review all the portions of an order based on an objection to a single portion of the order; and all the more so given that the statutory scheme makes clear that a District Judge does not have the authority to review *any portion* of an order of a Magistrate Judge when *no objections* are made to the order.

With respect to *dispositive* pre-trial motions, *i.e.*, Reports and Recommendations, Section 636(b)(1)(C) of the FMA provides, in relevant part, that "[a] [district] judge [] shall make a *de novo* determination of *those portions* of the report or specified proposed findings or recommendations *to which objection is made*. A judge of the court may accept, reject, or modify, *in whole or*

in part, the findings or recommendations made by the magistrate judge" (emphases added). Fed. R. Civ. P. 72(b)(3) is substantively identical to Section 636(b)(1)(C): "[t]he district judge must determine *de novo any part* of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition." Thus, while a District Judge must apply *de novo* review to those portions of a Report and Recommendation to which objections are made, he may also, consistent with the very nature of a Report and Recommendation, review those portions to which no objections are made, and, similarly, may review the entire Report and Recommendation even when no objections are made to it, as recognized in *Thomas v. Arn*, 474 U.S. 140, 154 (1985).

An order of a Magistrate Judge, by contrast, is "*self-operative in the absence of timely objections*." *Boyar v. Modell*, 1986 U.S. Dist. LEXIS 25896 at *5 (S.D.N.Y. May 5, 1986). *Accord, Alexander v. City & County of Honolulu Police Dep't*, 2007 U.S. Dist. LEXIS 72939 at *11 (D. Hawaii Sept. 12, 2007).

POINT V

THE ISSUANCE OF ORDERS BY MAGISTRATE JUDGES VIOLATES THE ARTICLE III PRINCIPLE OF JUDICIAL INDEPENDENCE AND THE CONSTITUTION'S STRUCTURAL PRINCIPLE OF SEPARATION OF POWERS

Because Magistrate Judgeships and their salaries are created by statute, *see* 28 U.S.C. §§ 631, 634, respectively, which, of course, may be repealed,

Magistrate Judges lack independence from Congress; As explained in *Schor, supra*:

> our precedents establish that Article III, § 1, not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as "an inseparable element of the constitutional system of checks and balances." *Northern Pipeline, supra*, at 58. *See also United States v. Will*, [449 U.S. 200], 217 [(1980)]. Article III, § 1, safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts "to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating" constitutional courts, *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C. J., dissenting), and thereby preventing "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (*per curiam*).

Schor, 478 U.S. at 853 (last set of brackets in original; other brackets added).

As explained in *United States v. Dees*, 125 F.3d 261 (5th Cir. 1997), District Judges, when delegating Article III power to Magistrate Judges, "risk devitalizing their own coordinate branch of government, thereby upsetting our constitutional balance of power." *Id.* at 267. In *Dees*, the court "raise[d] but ultimately reject[ed] a jurisdictional

challenge to [the defendant's] conviction based on the fact that a magistrate judge conducted her plea proceeding," *id.* at 262[3]; however, the court's following discussion is equally applicable to the issuance of orders by Magistrate Judges in civil matters:

> The "slippery slope" scenario here is easy to envision. District courts might begin by delegating small felony trials to magistrate judges. Meeting with some initial success, the pressure of their crushing caseloads would weaken their resolve and cause district courts to delegate even more felony trials to magistrate judges. Eventually, Congress would notice the trend. When asked to authorize new judgeships, or simply confirm new candidates to fill vacant ones, Congress would instead seek to increase the number of magistrate judges. With their lower salaries, magistrate judges would be more cost-effective than Article III judges, and, lacking life tenure, *more politically servient as well*. As the number of magistrate judges grew and the ranks of Article III judges

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The *Dees* court rejected the jurisdictional challenge because of, *inter alia*, two factors that are contrary to the facts in the present case: first, the court considered the taking of a plea to be "ministerial in nature," *Dees*, 125 F.3d at 267; and, second, the court observed that "the district [judge] retains ultimate control over the plea proceedings, which are submitted to the court for its approval . . . [for review] on a *de novo* basis, contributing to the ministerial nature of the magistrate's task." *Id.* at 268.

> thinned, district judges would become nothing more than judicial administrators, overseeing an army of magistrate judges. Our tripartite scheme of government would suffer. *See* Patrick E. Higginbotham, *Bureaucracy--The Carcinoma of the Federal Judiciary*, 31 Ala. L. Rev. 261, 265-66 (1980).

Id. at 267, n.6.

In Geras v. Lafayette Display Fixtures, 742 F.2d 1037 (7th Cir. 1984), the court rejected a Constitutional challenge to Section 636(c) of the FMA, which provides that a Magistrate Judge may, upon the consent of all parties, play the role, in full, of a District Judge in a civil matter. However, much of the reasoning of the dissenting opinion of Judge Posner is equally applicable to the present case:

> it is not true that just because [Magistrate Judges] are appointed by Article III judges they are independent from Congress. They are not nearly so independent as Article III judges are. They serve limited terms . . ., at the expiration of which Congress can reduce their salaries, or abolish their offices (selectively if it wishes) so that the judges cannot reappoint them.
>
> The fact that the appointing power has been given to Article III judges is the opposite of reassuring. . . . Appellate judges can reverse district judges, can mandamus them, can criticize them, can

> remand a case to another judge, but cannot fire district judges, cow them, or silence them -- cannot prevent them from making independent judgments and expressing independent views. . . .
>
> ***
>
> A judicial system in which the judges at the top control the careers of the judges below them concentrates judicial power immensely. . . . But until the current spate of cases upholding section 636(c), Article III seemed a barrier to making federal judges even more powerful by allowing them to appoint other judges whose subsequent careers they would control.

Geras, 742 F.2d at 1052-1053 (Posner, J., dissenting).

POINT VI

THE SECOND CIRCUIT WRONGLY FOUND THAT THE REQUIREMENT OF 15 U.S.C. § 1692e(11) THAT A DEBT COLLECTOR DISCLOSE, IN ALL DOCUMENTS, THAT IT IS A DEBT COLLECTOR, DOES NOT APPLY TO EACH DOCUMENT INDEPENDENTLY

The Second Circuit, employing the least-sophisticated-consumer standard to Petitioner's claim under 15 U.S.C. § 1692e(11), held:

> the thirty-day debt validation letter stated that [Respondent] Cooper, Paroff, Cooper & Cook had been retained to collect a debt of $2,854.79 consisting of Banks' [sic] past due rent. Given this letter, the least sophisticated consumer would understand that the rent demand notice, which bore the same date as the debt validation letter, was from the same law firm, and demanded the same sum, was from a debt collector.

Pet. App. at 4a. That two communications bear the same date, however, does not convert them into a single communication, a fact that the District Court recognized. *See* Pet. App. at 13a. In addition, the Second Circuit had previously recognized that Section 1692e(11) requires that *each* communication from a debt collector must be judged *independently* for its compliance, rather than in reference to what the recipient might know based on *other* documents. *See Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989). *Accord, Drossin v. Nat'l Action Financial Services, Inc.*, 641 F. Supp. 2d 1314, 1319 (S.D. Fla. 2009); *Savage v. NIC, Inc.*, 2009 U.S. Dist. LEXIS 65071 at *14-*15 (D. Ariz. July 28, 2009); *Schwarm v. Craighead*, 552 F. Supp. 2d 1056, 1081-82 (E.D. Cal. 2008).

POINT VII

THE SECOND CIRCUIT MISINTERPRETED 15 U.S.C. § 1692f(1) AS APPLYING ONLY TO THE ACTUAL, BUT NOT THE ATTEMPTED, COLLECTION OF AN UNAUTHORIZED DEBT

The Second Circuit, in affirming the dismissal of Petitioner's claim under 15 U.S.C. § 1692f(1), reasoned that:

> Bank argues that [Respondents] violated the FDCPA's prohibition against "[t]he collection of any amount (including any . . . fee . . .) unless such amount is expressly authorized by the agreement creating the debt," 15 U.S.C. § 1692f(1), when they included a $ 35 bad check fee in the rent demand notice because the lease authorized only a $ 25 bad check fee. Bank admitted at oral argument, however, that [Respondents] never actually collected a $ 35 bad check fee. Therefore, we do not find a violation of section 1692f(1), which prohibits the collection of unauthorized fees.

Pet. App. at 4a. However, the Second Circuit, in *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 307 (2d Cir. 2003), had squarely rejected the notion that Section 1692f(1) applies only to the actual collection of an authorized debt. *Accord, Johnson v. Riddle*, 305 F.3d 1107, 1111 (10th Cir. 2002); *Green v. Hocking*, 9 F.3d 18, 20 (6th Cir. 1993), *abrogated on other grounds, Heintz v. Jenkins*, 514 U.S. 291 (1995) ("15 U.S.C. § 1692f(1) [] proscrib[es] the collection, *or*

attempted collection, of any amount, including interest, 'unless such amount is expressly authorized by the agreement creating the debt or permitted by law.'") (emphasis added); *Daneshrad v. Cohen & Slamowitz, LLP*, 2009 U.S. Dist. LEXIS 18173 at *15 (E.D.N.Y. Mar. 9, 2009).

POINT VIII

THE SECOND CIRCUIT DISREGARDED THE PLAIN MEANING OF "ANY AMOUNT" IN 15 U.S.C. 1692f(1)

The Second Circuit also stated, with respect to Petitioner's claim under 15 U.S.C. § 1692f(1), that "we do not find [Respondent]s' attempt to collect $ 35 to be an 'unfair or unconscionable means to . . . attempt to collect any debt.' *See id.* § 1692f. Our conclusion is *bolstered* by both parties' recognition that the inclusion of a $ 35 fee instead of a $ 25 fee was a clerical error." Pet. App. at 4a (emphasis added). In addition to the Second Circuit's lack of clarity regarding the primary basis for this finding, it remains that, whether or not Respondents' attempt to collect an unauthorized $10.00 was "unfair or unconscionable" in a colloquial sense is irrelevant, for the statute could not be any more clear: "the following conduct is a violation of [] [S]ection [1692f]: (1) The collection of *any amount* (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law" (emphasis added). It is further apparent that this provision, by including "any interest, fee, charge, or expense incidental to the principal obligation," contemplates that the attempted

collection of even small amounts would, when such amounts are unauthorized, violate the provision. Not only is the Second Circuit's interpretation incorrect; it also invites further litigation over the issue of what excess charges are "unfair or unconscionable" for a debt collector to seek. In any event, Respondents' attempt to collect an extra ten dollars hardly looks small once it is recognized that this means that they attempted to collect an amount that was forty percent higher than the permissible amount of $25.00.

POINT IX

RULE 43(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT AUTHORIZE TESTIMONY TO BE USED IN ORDER TO NEGATE A SUMMARY-JUDGMENT MOVANT'S FAILURE TO COMPLY WITH THE EVIDENTIARY RULES RELATING TO SUCH MOTION

As noted in Point VIII, *supra*, the Second Circuit stated, with respect to its affirmance of the dismissal of Petitioner's claim under 15 U.S.C. 1692f(1), that "[o]ur conclusion is bolstered by both parties' recognition that the inclusion of a $ 35 fee instead of a $ 25 fee was a clerical error." Pet. App. at 4a. The Second Circuit's use of the term "clerical error" was a apparently a reference to the fact that the District Court had, based on the bona-fide-error affirmative defense of Section 1692k(c), dismissed Petitioner's claim under 15 U.S.C. 1692f(1). *See* Pet. App. at 14a-16a.

The District Court's finding in favor of

Respondents regarding the bona-fide-error affirmative defense was based on the District Court's taking of oral testimony by Respondent Adam P. Cooper. *See* App. 14a-16a. This testimony was accepted by the District Court despite (and because) the factual assertions made by Respondents in support of their request for the dismissal of Petitioner's claim under 15 U.S.C. 1692f(1) were, as Petitioner pointed out in his opposition to Respondents' motion, confined to their Memorandum of Law in support of their motion, rather than being asserted in a form that constitutes admissible evidence, as a result of which, Petitioner argued, Respondents' motion with respect to that claim, having been based on Respondents' factual assertions, should have been denied.

Although the Second Circuit has stated that "a District Court may take oral testimony on a summary judgment motion pursuant to Rule 43([c]) of the Federal Rules of Civil Procedure," *Vital v. Interfaith Medical Center*, 168 F.3d 615, 621 (2d Cir. 1999), there is no support for the notion that such testimony may be used to negate a summary-judgment movant's failure to comply with the rules relating to such motion.

POINT X

A PLAINTIFF'S BELIEF THAT A DEFENDANT HAS MET A CRITERION THAT IS PART OF AN AFFIRMATIVE DEFENSE DOES NOT REMOVE THE BURDEN OF PROVING THE AFFIRMATIVE DEFENSE FROM THE DEFENDANT

Petitioner's belief as to whether Respondents had made a clerical error, *see* Point IX, *supra*, had no relevance to the issue of whether Respondents had met *their burden* under the bona-fide-error exception; nor was Petitioner's opinion relevant to what a jury *could* or *might* have found: not only does "the Act impose[] strict liability, [such that] a consumer need not show intentional conduct by the debt collector to be entitled to damages," *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir. 1996), but, under the bona-fide-error exception, a defendant is required to "show[] by a preponderance of the evidence that the violation was not intentional *and* resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c) (emphasis added). Thus, the District Court's finding that Respondents' violation was caused by a clerical error, *see* Pet. App. at 15a-16a, would have meant only that Respondents had satisfied the first of the two prongs of the bona-fide-error defense.

With respect to the second prong of the defense, moreover, a jury clearly could have found that "[Respondents'] procedure of accepting [] information [concerning fees] only in writing rather than over the phone in order to prevent clerical errors," Pet. App. at 15a, was not "reasonably adapted to avoid any such

error"; for example, Respondents could have simply looked at the parties' lease, which, as shown in Point VII, limited the bounced-check fee to $25.00. As to whether such, or a similar, measure should have been utilized, that was a question for a jury.

POINT XI

RESPONDENTS' SUCCESS IN THE PARTIES' STATE-COURT PROCEEDING WAS IRRELEVANT TO WHETHER PETITIONER STATED CLAIMS UNDER 15 U.S.C. §§ 1692e(2)(A), (5), AND (10)

The Second Circuit, in support of its ruling with respect to the affirmance of Petitioner's claims under 15 U.S.C. §§ 1692e(2)(A), (5), and (10), stated that Respondents "commence[d] summary proceedings in state court and [Respondents] prevailed." Pet. App. at 3a. However, based on *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), the Second Circuit had previously recognized that "federal suits cannot be barred by *Rooker-Feldman* unless they complain of injuries produced by state-court judgments." *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 88 (2d Cir. 2005). Here, the Rent Notice was served upon Petitioner *before* the state court issued its judgment; indeed, before the state-court proceeding even began. Thus, Petitioner clearly had not complained of any injuries that were caused by the state-court judgment.

POINT XII

THE SECOND CIRCUIT MISCONSTRUED NEW YORK LAW IN AFFIRMING THE DISMISSAL OF PETITIONER'S CLAIMS UNDER 15 U.S.C. §§ 1692e(2)(A), (5), AND (10)

The Second Circuit, in affirming the dismissal of Petitioner's claims under 15 U.S.C. §§ 1692e(2)(A), (5), and (10), interpreted *Brusco v. Miller*, 639 N.Y.S.2d 246 (N.Y. App. 1995), as supporting the notion that a landlord of rent-stabilized premises may *threaten* a tenant with a possessory judgment based on a tenant's failure to pay ancillary fees, *see* Pet. App. at 3a, even though the tenant's failure to pay such fees could *not* serve as the basis for a possessory judgment, but only as the basis for a money judgment. However, *Brusco* flatly opposed the notion that the Second Circuit attributed to it. *See Brusco*, 639 N.Y.S.2d at 247, [A]. *See also Related Tiffany, L.P. v. Faust*, 743 N.Y.S.2d 802, 803-804 (N.Y. App. 2002) (failure to pay ancillary fees does not entitle a landlord of rent-stabilized premises to a possessory judgment); *Silber v. Schwartzman*, 575 N.Y.S.2d 226, 226-227 (N.Y. App. 1991) (same).

Respondents' Rent Notice, rather than indicating that Petitioner's failure to pay ancillary fees could result only in a money judgment in favor of Petitioner's landlord, stated that the failure to pay those fees would result in the landlord's right to possession of Petitioner's rent-stabilized apartment, including the right to a possessory judgment if Petitioner were to not vacate the apartment. *See* Pet. App. at 3a, 7a. Thus, the Rent Notice indisputably violated the provisions of the FDCPA that gave rise to

Petitioner's claims under 15 U.S.C. §§ 1692e(2)(A), (5), and (10).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be granted.

May 3, 2010

Respectfully submitted,

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(718) 520-7125

Petitioner Attorney Pro Se

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by the Second Circuit's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of December, two thousand nine.

PRESENT:

ROBERT A. KATZMANN,
GERARD E. LYNCH,
Circuit Judges.[1]

TODD C. BANK,

Plaintiff-Counter-Defendant-Appellant,

v.

COOPER, PAROFF, COOPER & COOK, IRA G. COOPER, PHILIP S. PAROFF, ADAM P. COOPER, SHARON E. COOK,

Defendants-Counterclaimants-Appellees.

For Plaintiff-Counter-Defendant-Appellant:
TODD C. BANK, *pro se*, Kew Gardens, NY

For Defendants-Counterclaimants-Appellees:
ADAM P. COOPER (Ira G. Cooper, *on the brief*), Cooper, Paroff, Cooper & Cook, Kew Gardens, NY

Appeal from the United States District Court for the Eastern District of New York (Weinstein, *J.*).

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[1] The Honorable Joseph M. McLaughlin, originally a member of the panel, recused himself from consideration of this matter. The remaining members of the panel, who are in agreement, have decided the case pursuant to 2d Cir. R. § 0.14(b).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the judgment of the district court be and hereby is **AFFIRMED.**

Plaintiff-Appellant Todd C. Bank appeals from the May 27, 2009 Memorandum, Order & Judgment of the District Court for the Eastern District of New York (Weinstein, J.) granting summary judgment to defendants. We assume the parties' familiarity with the facts and procedural history of the case.

Bank claims that defendants violated five provisions of the Federal Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, when they sent him a rent demand notice stating that he owed $ 2,854.79 in past due rent and fees, and demanding that he pay that amount or surrender possession, in default of which the landlord would commence summary proceedings for possession. Bank first argues that the inclusion of fees in the rent demand notice was misleading pursuant to 15 U.S.C. §§ 1692e(2)(A), (5), and (10) because under New York law, defendants could not recover possession of his rent-stabilized apartment for his failure to pay fees. *See Silber v. Schwartzman*, 150 Misc. 2d 1, 575 N.Y.S.2d 226, 226-27 (1st Dep't 1991) (per curiam). We conclude that the inclusion of fees did not render the rent demand notice fatally defective, *see Brusco v. Miller*, 167 Misc. 2d 54, 639 N.Y.S.2d 246, 247 (1st Dep't 1995) (per curiam), or misleading. In fact, defendants did commence summary proceedings in state court and defendants prevailed.

Bank next contends that the rent demand notice violated the FDCPA because it failed to disclose that it

was from a debt collector. *See* 15 U.S.C. § 1692e(11). We disagree. The "question of whether a communication complies with the FDCPA is determined from the perspective of the least sophisticated consumer." *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 90 (2d Cir. 2008) (internal quotation marks omitted). Here, the thirty-day debt validation letter stated that defendant Cooper, Paroff, Cooper & Cook had been retained to collect a debt of $ 2,854.79 consisting of Banks' past due rent. Given this letter, the least sophisticated consumer would understand that the rent demand notice, which bore the same date as the debt validation letter, was from the same law firm, and demanded the same sum, was from a debt collector.

Finally, Bank argues that defendants violated the FDCPA's prohibition against "[t]he collection of any amount (including any . . . fee . . .) unless such amount is expressly authorized by the agreement creating the debt," 15 U.S.C. § 1692f(1), when they included a $ 35 bad check fee in the rent demand notice because the lease authorized only a $ 25 bad check fee. Bank admitted at oral argument, however, that defendants never actually collected a $ 35 bad check fee. Therefore, we do not find a violation of section 1692f(1), which prohibits the collection of unauthorized fees. Further, we do not find defendants' attempt to collect $ 35 to be an "unfair or unconscionable means to . . . attempt to collect any debt." *See id.* § 1692f. Our conclusion is bolstered by both parties' recognition that the inclusion of a $ 35 fee instead of a $ 25 fee was a clerical error.

In addition to his arguments on the merits, Bank contends that the adjudication of his case by a

senior judge violated Article III. The argument is without merit. Senior judges are fully commissioned Article III judges, and the Supreme Court has expressly held that upon assuming senior status, a senior judge "does not surrender his commission, but continues to act under it." *Booth v. United States*, 291 U.S. 339, 350-51, 54 S. Ct. 379, 78 L. Ed. 836, 78 Ct. Cl. 845 (1934); *see also United States v. Moore*, 101 F 2d 56 (2d Cir. 1939).

We have considered the remainder of plaintiff-appellant's arguments and conclude that they lack merit. Accordingly, for the foregoing reasons, the judgment of the district court is hereby **AFFIRMED.**

FOR THE COURT
Catherine O'Hagan Wolfe, Clerk

By: Richard Alcantara, Deputy Clerk

Catherine O'Hagan Wolfe [signature]

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MEMORANDUM, ORDER & JUDGMENT
08-CV-3936 (JBW)

Dated May 27, 2009, and Entered May 28, 2009

TODD C. BANK,

Plaintiff,

-against-

COOPER, PAROFF, COOPER & COOK, IRA G. COOPER, PHILIP S. PAROFF, ADAM P. COOPER, SHARON E. COOK,

Defendants.

JACK B. WEINSTEIN, Senior District Judge:

I. Introduction

Plaintiff, an attorney proceeding *pro se*, moves to vacate the magistrate judges's orders of January 15, 2009 and February 4, 2009 and for resolution of his motion for an extension of time to serve a motion to dismiss defendants' counterclaim. Defendants move for summary judgment on all claims. A hearing was held on May 13, 2009.

II. Facts

The complaint alleges five violations of the Federal Fair Debt Collection Practices Act ("FDCPA") by the defendant law firm in relation to its notice of past-due rent. Damages of $ 1,000 and attorney's fees are sought, in part for a ten dollar mistake by defendant in the amount of a bad check fee. Defendants represent plaintiff's landlord. The parties engaged in separate landlord-tenant litigation in state court, where plaintiff apparently lost and a legal fee issue is currently on appeal.

Two letters sent to plaintiff by defendants are at issue: a "thirty-day debt validation letter," see Appendix A, and a "five-day demand notice," see Appendix B. Both are dated January 14, 2008. The plaintiff's claims are all directed toward the five-day demand notice. Alleged are violations of sections 1692e ("False or misleading representations") and 1692f ("Unfair practices") of Title Fifteen of the United States Code. In essence, plaintiff argues that the five-day demand notice violated the FDCPA because it: 1) overstated the amount owed for a bad check fee by ten dollars; 2) suggested plaintiff could be forced to surrender possession of the premises for failure to pay late fees and a bad check fee; and 3) failed to disclose that it was a communication from a debt collector.

III. Motion to Vacate the Magistrate Judge's Orders and for Resolution of Motion for Extension of Time to Serve a Motion to Dismiss Defendants' Counterclaim

Plaintiff challenges the constitutionality of senior judges and magistrate judges deciding cases. He

sought reassignment to an active district judge. That request was referred to Chief Judge Dearie, who denied the motion for reassignment. See Order, Mar. 31, 2009, Docket Entry No. 39.

The remaining portion of plaintiff's motion relates to the counterclaim asserted in defendants' answer to the complaint seeking costs, disbursements, attorney's fees, and dismissal of the action on the ground that it was brought in bad faith and for the purpose of harassment. Much of plaintiff's highly contentious papers are concerned with largely frivolous arguments about the Federal Rules and practice. He claims the magistrate judge had no power to deny his request for an extension of time to serve his motion to dismiss defendants' counterclaim because he had not yet made a formal motion. He claims that he was prejudiced by the fact that once he did make a formal motion for an extension, the magistrate judge treated it as a motion for reconsideration. Plaintiff's arguments about the minutiae of Federal Rule of Civil Procedure 6(b)(1)(B) ("When an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect.") fail to recognize that a court has broad discretion on whether to grant an extension under that rule. Rule 6(b)(1)(B), if it limits the court's discretion at all, controls it in the context of granting such a motion, not in denying it. The magistrate judge acted well within her discretionary powers in refusing the request for an extension.

Plaintiff's procedural contentions lack merit. For reasons clarified below, his motion is in any case moot.

IV. Defendants' Motion for Summary Judgment

A. Summary Judgment Standard

Summary judgment is appropriate only if "there is no genuine issue as to any material fact . . . [in which case] the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *see also Mitchell v. Washingtonville Central School District*, 190 F.3d 1, 5 (2d Cir. 1999). It is warranted when after construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor, there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); *see Anderson*, 477 U.S. at 247-50, 255; *Sledge v. Kooi*, 556 F.3d 137, 140 (2d Cir. 2009).

The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact. *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995); see *also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party appears to meet this burden, the opposing party must produce evidence that raises a material question of fact to defeat the motion. See Fed. R. Civ. P. 56(e). This evidence may not consist of "mere conclusory allegations, speculation or conjecture." *Citarelli v. Village of Babylon*, 93 F.3d 47, 51 (2d Cir. 1996); *see also Delaware & Hudson Ry. v. Consolidated Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990) ("Conclusory allegations will not suffice to create a genuine issue.").

B. Fair Debt Collection Practices Act

"[T]he FDCPA generally forbids collectors from engaging in unfair, deceptive, or harassing behavior." *Kropelnicki v. Siegel*, 290 F.3d 118, 127 (2d Cir. 2002). The Act applies to lawyers engaged in litigation over unpaid debts, *see Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995), including attorneys who send rent demand notices to tenants. *See Romea v. Heiberger & Associates*, 163 F.3d 111, 119 (2d Cir. 1998). "[T]he question of whether a communication complies with the FDCPA is determined from the perspective of the 'least sophisticated consumer.'" *Jacobson v. Healthcare Financial Services, Inc.*, 516 F.3d 85, 90 (2d Cir. 2008). "Because the [FDCPA] imposes strict liability, a consumer need not show intentional conduct by the debt collector to be entitled to damages." *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33-34 (2d Cir. 1996). But a debt collector may avoid liability for a violation upon establishing both: 1) that it was unintentional; and 2) that it "resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c).

Upon a finding of liability, a debt collector is liable for: 1) actual damages; 2) "such additional damages as the court may allow, but not exceeding $ 1,000;" and 3) costs and "a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1692k(a). In determining the amount of liability, the court is to consider "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional." 15 U.S.C. § 1692k(b).

C. Application of Law to Facts

1. Counts One, Two and Three

Count one alleges a violation of section 1692e(2)(A) ("The false representation of . . . the character, amount, or legal status of any debt."). Count two alleges a violation of section 1692e(5) ("The threat to take any action that cannot legally be taken or that is not intended to be taken."). Count three alleges a violation of section 1692e(10) ("The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.").

Plaintiff attempts to make out violations of sections 1692e(2)(A), 1692e(5) and 1692e(10) by arguing that the inclusion of a "late fee" and a "bad check fee" in the five-day rent demand notice constituted a false representation and a threat to take illegal action because he could not legally be forced to surrender possession of the premises for failure to pay such fees under various provisions of New York state and city law.

The defendants' inclusion of the two fees in the total figure for "rent" in the five-day demand notice was supported by the terms of the lease (which deemed such fees "added rent") and by defendants' interpretation of New York housing law. See *Brusco v. Miller*, 167 Misc. 2d 54, 639 N.Y.S.2d 246 (N.Y. Sup. Ct. App. Term 1995). In addition, plaintiff had ample opportunity to challenge under state and city law the form and contents of the five-day demand notice in the state landlord-tenant litigation.

Courts should avoid finding a FDCPA violation on grounds that may be inextricably intertwined with the merits of a state court proceeding. *See Kropelnicki v. Siegel*, 290 F.3d 118, 128-129 (2d Cir. 2002) (concluding *Rooker-Feldman* doctrine applied to bar the federal Court of Appeals from reviewing claim of "violation of the FDCPA on the basis of the defendant's alleged misrepresentation" because it was "inextricably intertwined with the state court default judgment and the motion to vacate it"). While there may be dispute between the parties as to the legality of the five-day demand notice under applicable housing law, reliance on the terms of the FDCPA is not the appropriate method for the resolution of that dispute. *Cf. Heintz v. Jenkins*, 514 U.S. 291, 295-96, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) ("we do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken'" under § 1692e(5)).

The five-day demand notice itemized the various components of the debt claimed in a clear way understandable to a layperson. There was no deception in the defendants' indication in the five-day demand notice of intent to commence summary proceedings. Such proceedings appear to have in fact been promptly commenced. The state landlord-tenant litigation resulted in a judgment for the defendants on the full amount of debt sought, including the fees. The parties report that the full amount has been paid by plaintiff.

These claims are without merit.

2. Count Four

Count four alleges a violation of 1692e(11) ("The

failure to disclose in the initial written communication with the consumer . . . that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.").

The five-day demand notice and the thirty-day debt validation letter were prepared on the same day. Plaintiff likely did not receive the two documents at the same time, because one was mailed and one was served by a process server. See Hr'g Tr. 9. Neither party has offered evidence as to which of the two letters was the "initial" communication, but the plaintiff makes no claim of a violation related to the initial communication. Rather, he claims that the five-day demand notice failed to disclose that the communication was from a debt collector.

The thirty-day debt validation letter contained the required disclosures that a debt collector was attempting to collect a debt and that any information obtained would be used for that purpose. *See* 15 U.S.C. § 1692e(11). The five-day demand notice lacks the language used in the thirty-day debt validation letter, but it is obvious from the face of the letter that the communication is from a "debt collector." *See Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 26 (2d Cir. 1989) ("We reject at the outset [plaintiff's] contention that the Notice violated the statute because it failed to state in so many words that the Bureau was attempting to collect a debt."); *Emanuel v. American Credit Exchange*, 870 F.2d 805, 808 (2d Cir. 1989) ("the letter disclosed clearly that it was a communication to

collect a debt . . . there simply is no requirement that the letter quote verbatim the language of the statute").

The least sophisticated consumer would understand the five-day demand notice to have been from a debt collector. Alternatively, the five-day demand notice must be read together with the thirty-day debt validation letter -- as any consumer would -- since they bear the same date. All required disclosures were provided to plaintiff in the initial communication consisting of those two documents. "[T]here is nothing wrong with demanding payment of the debt at the same time the validation notice is given." *Day v. Allied Interstate, Inc.*, No. 09-495, 2009 U.S. Dist. LEXIS 35156, 2009 WL 1139474, at *2 (E.D.N.Y. Apr. 27, 2009) (citing *Jacobson v. Healthcare Financial Services, Inc.*, 516 F.3d 85, 90 n.4 (2d Cir. 2008)).

This claim is without merit.

3. Count Five

Count five alleges a violation of section 1692f(1) ("A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt . . . the following conduct is a violation of this section: The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.").

Plaintiff contends that defendants violated section 1692f(1) because the five-day demand notice included an amount due for a bad check fee that exceeded the amount permitted under plaintiff's lease

by ten dollars. Defendants concede that the "bad check fee" listed on the five-day demand notice should have been twenty-five rather than thirty-five dollars. They raise the defense of bona fide error under section 1692k(c) ("A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."). They contend that the incorrect fee amount was conveyed to their office by the landlord, despite their procedure of accepting such information only in writing rather than over the phone in order to prevent clerical errors.

Defendants have the burden of proving by a preponderance of the evidence both: 1) that the violation was unintentional and; 2) that it resulted from a bona fide error notwithstanding procedures reasonably adapted to avoid any such error. Whether the ten dollar overstatement "resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error," 15 U.S.C. § 1692k(c), is an issue of fact. At the summary judgment hearing, the plaintiff declined the court's offer to take sworn testimony of the attorney who supervised the issuance of the complained-of notice. *See* Hr'g Tr. 10-17. Given plaintiff's waiving his right to admissible evidence on this point, defendants' submission (made by a practicing attorney) is credited. The issue is *de minimis*. It does not warrant burdening this court and the parties with discovery. Nevertheless, the issue is decided in favor of the defendant. A reasonable jury could only conclude that this discrepancy was the result of a bona fide error.

Plaintiff conceded as much at oral argument. *See id.* at 25 ("I'm not suggesting, by the way, that it was anything more than a clerical error").

Plaintiff's contention has no merit.

V. Costs, Disbursements and Attorney's Fees

The defendants seek costs, disbursements, attorney's fees, and dismissal of the action on the ground that it was brought in bad faith and for the purpose of harassment. *See* 15 U.S.C. § 1692k(a)(3) (If the court finds that an action under the FDCPA "was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs."). The court finds that no costs, disbursements or attorney's fees should be awarded. The action was not brought in bad faith or for the purpose of harassment.

VI. Conclusion

The motion by defendants for summary judgment is granted. Defendants' counterclaim is dismissed. Plaintiff's motion to dismiss defendants' counterclaim is now moot. The case is dismissed.

SO ORDERED.

/s/ Jack B. Weinstein
Senior United States District Judge

Dated: May 27, 2009
Brooklyn, New York

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORDER

Case 1:08-cv-03936-JBW-LB

Dated and Entered January 15, 2009

TODD C. BANK,

Plaintiff,

-against-

COOPER, PAROFF, COOPER & COOK, IRA G. COOPER, PHILIP S. PAROFF, ADAM P. COOPER, SHARON E. COOK,

Defendants.

Plaintiff's request for a conference is DENIED. As to whether plaintiff's late Motion to Dismiss defendant's counterclaims would prejudice defendants - plaintiff could have requested an extension of time. He did not do so. Therefore, defendants were within their rights to reject the late service.

Ordered:

/s/
Lois Bloom
U.S.M.J.
1/15/09

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORDER

08 cv 3936 (JBW) (LB)

Dated February 4, 2009, and
Entered February 5, 2009

TODD C. BANK,

Plaintiff,

-against-

COOPER, PAROFF, COOPER & COOK, IRA G. COOPER, PHILIP S. PAROFF, ADAM P. COOPER, SHARON E. COOK,

Defendants.

BLOOM, United States Magistrate Judge:

Plaintiff moves for an order extending the time to "serve plaintiff's motion to strike defendants' counterclaim, deeming service of same to have occurred on January 7,2009 *nunc pro tunc*, and permitting defendants to respond to that motion up to thirty-three (33) days after the granting of the instant motion."[1] See

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[1] Plaintiff addresses his motion to Judge Weinstein, who

docket entry 22. As the Court previously endorsed plaintiff letter, stating that defendants were within their rights to reject the late service of plaintiff's motion as plaintiff could have requested an extension of time to serve his motion, see docket entry 21, the Court construes plaintiff's instant request as seeking reconsideration. Plaintiff states that defendants would not be prejudiced, that the length of the delay in serving his motion and the impact to the judicial proceedings was minimal, that the reason for the delay was computer malfunction and that plaintiff acted in good faith in resolving this problem.[2] See docket entry 22 at 8. Defendants oppose plaintiff's motion. See docket entry 23. Plaintiff's varying explanations for his untimely service of his motion (i.e. that it was "inadvertent," see docket entry 20, and later that it was "excusable neglect," see docket entry 22) does not explain why plaintiff failed to contact defendants' counsel or the Court to request an extension. Furthermore, plaintiff is an attorney who had a month to prepare his motion to strike. Accordingly, plaintiff fails to satisfy the Court that he is entitled to reconsideration and therefore, his motion is denied.

SO ORDERED.

---

has referred the motion to me

2

Plaintiff states that he had a Mr. Rudgayzer review and mail his motion papers. See docket entry 22 at 4. The Court also notes that Albert Rudgayzer is listed as plaintiffs attorney on the civil docket for this case and on plaintiff's motion papers, id. at 1, 5, 10. However, Mr. Rudgayzer has not filed a notice of appearance on plaintiff's behalf.

/s/ Lois Bloom
LOIS BLOOM
United States Magistrate Judge

Dated: February 4, 2009
Brooklyn, New York

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORDER

08-CV-3936 (JBW)

Dated and Entered March 31, 2009

TODD C. BANK,

Plaintiff,

-against-

COOPER, PAROFF, COOPER & COOK, IRA G. COOPER, PHILIP S. PAROFF, ADAM P. COOPER, SHARON E. COOK,

Defendants.

DEARIE, Chief Judge:

In this action pending before Senior Judge Weinstein, plaintiff moves for: reassignment of his motion from Judge Weinstein "to an Active District Judge;" vacatur of the Orders of Magistrate Judge Bloom dated January 15, 2009 and February 4, 2009; and resolution "by an Active District Judge and under the 'good cause' standard'" of his motion for an extension of time to serve his motion to dismiss defendants' counterclaim. See Docket Entry. No. 34.

In voicing timely objections to rulings of the assigned Magistrate Judge, plaintiff, for the first time

in this litigation, launches a broad-based challenge to the constitutionality of the authority of senior judges to hear cases, asserting, without qualification, that "[t]he instant motion should be assigned to an Active District Judge because Senior Judgeships are unconstitutional." As a consequence, plaintiff further argues, the exercise by Magistrate Judges (in cases assigned to Senior Judges) of their established statutory powers under the Federal Magistrates Act, 28 U.S.C. § 636, also violates Article III of the Constitution. Without addressing the questions, Judge Weinstein referred those portions of plaintiff's objections to the undersigned for resolution. See Docket Entry No. 36 ("This motion challenging the Court's organization is respectfully referred to Chief Judge Raymond J. Dearie").

Plaintiff's glib recitation of various statutory and secondary sources provides no support for his view that the service of senior judges runs afoul of Article III of the Constitution nor for his constitutional challenge to the exercise by Magistrate Judges, in cases assigned to senior judges, of powers authorized by the Federal Magistrates Act. Plaintiffs application to reassign the pending motion, or case, is in all respects denied.

SO ORDERED.

Dated: March 31, 2009
Brooklyn, New York

/s/ Raymond J. Dearie
United States District Judge

APPENDIX F

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of February, two thousand ten.

09-2641-cv

TODD C. BANK,

Plaintiff-Counter-Defendant-Appellant,

v.

COOPER, PAROFF, COOPER & COOK, IRA G. COOPER, PHILIP S. PAROFF, ADAM P. COOPER, SHARON E. COOK,

Defendants-Counterclaimants-Appellees.

Todd Bank having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK
[signature]

APPENDIX G

PROVISIONS INVOLVED

A. CONSTITUTIONAL PROVISIONS

1. Article II, Section 2, cl. 2

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2. Article II, Section 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

3. Article III, Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and [shall be vested] in such inferior Courts as the Congress may from time to time

ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

B. STATUTORY PROVISIONS

1. 15 U.S.C. § 1692e

False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

* * *

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

* * *

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written

communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

***

2. 15 U.S.C. § 1692f

Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly creating the debt or permitted by law.

***

3. 28 U.S.C. § 294

Assignment of retired Justices or judges to active duty

(a) Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be

designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.

(b) Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of this court to perform such judicial duties in such court as he is willing and able to undertake.

(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge or bankruptcy judge, or in a court other than his own, in the case of any other retired judge of the United

States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court.

(c) No retired Justice or judge shall perform judicial duties except when designated and assigned.

4. 28 U.S.C. § 371

(a) Any justice or judge of the United States appointed to hold office during good behavior may retire from the office after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) and shall, during the remainder of his lifetime, receive an annuity equal to the salary he was receiving at the time he retired.

(b)(1) Any justice or judge of the United States appointed to hold office during good behavior may retain the office but retire from regular active service after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) of this section and shall, during the remainder of his or her lifetime, continue to receive the salary of the office if he or she meets the requirements of subsection (c).

(2) In a case in which a justice or judge who retires under paragraph (1) does not meet the requirements of subsection (c), the justice or judge shall continue to

receive the salary that he or she was receiving when he or she was last in active service or, if a certification under subsection (e) was made for such justice or judge, when such a certification was last in effect. The salary of such justice or judge shall be adjusted under section 461 of this title.

(c) [omitted]

(d) The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires under this section.

(e)(1) In order to continue receiving the salary of the office under subsection (b), a justice must be certified in each calendar year by the Chief Justice, and a judge must be certified by the chief judge of the circuit in which the judge sits, as having met the requirements set forth in at least one of the following subparagraphs:

(A) The justice or judge must have carried in the preceding calendar year a caseload involving courtroom participation which is equal to or greater than the amount of work involving courtroom participation which an average judge in active service would perform in three months. In the instance of a justice or judge who has sat on both district courts and courts of appeals, the caseload of appellate work and trial work shall be determined separately and the results of those determinations added together for purposes of this paragraph.

(B) The justice or judge performed in the preceding calendar year substantial judicial duties not involving courtroom participation under subparagraph (A), including settlement efforts, motion decisions, writing

opinions in cases that have not been orally argued, and administrative duties for the court to which the justice or judge is assigned. Any certification under this subparagraph shall include a statement describing in detail the nature and amount of work and certifying that the work done is equal to or greater than the work described in this subparagraph which an average judge in active service would perform in three months.

(C) The justice or judge has, in the preceding calendar year, performed work described in subparagraphs (A) and (B) in an amount which, when calculated in accordance with such subparagraphs, in the aggregate equals at least 3 months work.

(D) The justice or judge has, in the preceding calendar year, performed substantial administrative duties directly related to the operation of the courts, or has performed substantial duties for a Federal or State governmental entity. A certification under this subparagraph shall specify that the work done is equal to the full-time work of an employee of the judicial branch. In any year in which a justice or judge performs work described under this subparagraph for less than the full year, one-half of such work may be aggregated with work described under subparagraph (A), (B), or (C) of this paragraph for the purpose of the justice or judge satisfying the requirements of such subparagraph.

(E) The justice or judge was unable in the preceding calendar year to perform judicial or administrative work to the extent required by any of subparagraphs (A) through (D) because of a temporary or permanent disability. A certification under this subparagraph shall be made to a justice who certifies in writing his or

her disability to the Chief Justice, and to a judge who certifies in writing his or her disability to the chief judge of the circuit in which the judge sits. A justice or judge who is certified under this subparagraph as having a permanent disability shall be deemed to have met the requirements of this subsection for each calendar year thereafter.

(2) Determinations of work performed under subparagraphs (A), (B), (C), and (D) of paragraph (1) shall be made pursuant to rules promulgated by the Judicial Conference of the United States. In promulgating such criteria, the Judicial Conference shall take into account existing standards promulgated by the Conference for allocation of space and staff for senior judges.

(3) If in any year a justice or judge who retires under subsection (b) does not receive a certification under this subsection (except as provided in paragraph (1)(E)), he or she may thereafter receive a certification for that year by satisfying the requirements of subparagraph (A), (B), (C), or (D) of paragraph (1) of this subsection in a subsequent year and attributing a sufficient part of the work performed in such subsequent year to the earlier year so that the work so attributed, when added to the work performed during such earlier year, satisfies the requirements for certification for that year. However, a justice or judge may not receive credit for the same work for purposes of certification for more than 1 year.

(4) In the case of any justice or judge who retires under subsection (b) during a calendar year, there shall be included in the determination under this subsection of work performed during that calendar year all work

performed by that justice or judge (as described in subparagraphs (A), (B), (C), and (D) of paragraph (1)) during that calendar year before such retirement.

5. 28 U.S.C. § 636(b)

(1) Notwithstanding any provision of law to the contrary—

(1)(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(1)(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(1)(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B)

with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

6. Fed. R. Civ. P. 6(b)

(b) Extending Time.

(b)(1) In General.

When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(b)(1)(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(b)(1)(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

7. Fed. R. Civ. P. 43(c)

When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

8. Fed. R. Civ. P. 72

(a) Nondispositive Matters.

When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

(b)(1) Findings and Recommendations.
A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail

a copy to each party.

(b)(2) Objections.
Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

(b)(3) Resolving Objections.
The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.